No. 16515

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, Trustee in Bankruptcy of the Estate of AMPSCO PRODUCTS OF CALIFORNIA, INC., Bankrupt,

Appellant,

vs.

L. E. McINTYRE and M. H. McINTYRE, doing business as L. E. McINTYRE & Co.,

Appellees.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLANT'S REPLY BRIEF.

Appellee's answering brief, entitled "Respondent's Answering Brief", fails substantially, it is submitted, in actually "answering" the legal authority, both statutory and judicial, on the issues herein, as presented in Appellant's Opening Brief. This reply brief of appellant will seek to avoid repeating material already presented in Appellant's Opening Brief, and will be limited to a brief effort to point out a few of the areas wherein appellees have failed to meet headon the impact of the issues actually presented by this appeal.

The basic issue at the trial before the Referee in Bankruptcy, upon the review before the District Court and upon this appeal is whether the language in the subject mortgage sufficiently describes the personal property intended to be made subject to such chattel mortgage so as

to constitute a description considered legally adequate under the law of California. The parties to this appeal are in agreement that California Civil Code Section 2956 requires that the chattel mortgage describe the property. Appellees, in their Point III (page 7 of Answering Brief), completely beg the question on this basic point by blandly volunteering the statement that the subject mortgage instrument complied "with all of the minimum requirements of Section 2956 including a description of the property." Obviously conscious of the lack of substance to such statement as either authority or argument, appellees quickly run for the shelter they may find under the spreading branches of the "equities tree". Alas, this tree is but a mirage for appellees. It is the same cool-blue-lagoon-surrounded-by-palm-trees mirage as was previously glimpsed by the trial court. This is a law case and must be determined and decided by applicable principles of law. It is axiomatic that in a law matter, particularly one of statutory interpretation, the court cannot disregard the applicable and governing law appropriate to the facts of the case and permit itself to be swayed by the size of either the chancellor's foot or the chancellor's heart. At one point, the trial court clearly recognized this. In ruling from the bench, the Referee said:

> "There is no equity here, Mr. Shutan. This is just hard, tight-fisted law under the terms of which something may be taken away from a person who in good faith paid a valuable consideration for it purely upon the technicality of a statute. And, so, it is not a case which calls for the exercise of any equitable jurisdiction that the Court may have . . ."
>
> ". . . the Court must not permit any sympathy for the claimant or prejudice against the one who resists a claim to interfere with his judgment. He must de-

cide it upon the facts and the law, whatever his private opinion of the law may be as he finds such facts and law to be in a given case." [Tr. 59.]

The Referee was, of course, correct in such expression. Unfortunately, his heart shortly thereafter overruled him, and he ruled in favor of appellees as the ones who had "the equitable side of the case." In view of the state of the law of California, this was the essential error in the trial court.

Appellees fall quite short in their effort to limit the authority and significance of *Kahriman v. Jones,* 203 Cal. 254; 263 Pac. 537, wherein the California Supreme Court reiterated the requirement that the provisions of the California Civil Code relating to chattel mortgages must be strictly construed. (See Opening Brief, p. 8.)

In their reference to California case law discussed under Point V of the Answering Brief, appellees make some references which require either comment, amplification or actual correction. Appellees cite the case of *John Breuner Co. v. King,* 9 Cal. App. 271 (Answering Brief, p. 12), in support of their position that the description in the instant mortgage was sufficient. Not only did the mortgage in the *Breuner* case describe *"all* the furniture, upholstery, carpets, draperies, chinaware and other household goods of every kind . . .", giving the exact address, but the litigation was between the parties to the mortgage and did not involve the rights of third parties.

In referring to the case of *Pacific States Savings and Loan Company v. Hoffman,* 134 Cal. App. 604, appellees (Answering Brief, p. 13) describes the claimant as a "party not the mortgagor, who apparently was a third party without notice." A reading of the opinion in this case will show that the claimant was the successor in in-

terest to the mortgagor, and was actually in possession of the personal property in question. (This point was brought to appellees' attention by appellant in oral argument in the District Court.)

At the bottom of page 13, and continuing onto page 14 of the Answering Brief, appellees set forth their version of "principles of California Law . . ." in determining the sufficiency of a description in a chattel mortgage. In item 3 (Answering Brief, p. 14), appellees make the flat statement that if the mortgage contains a specific identification of location "a more specific designation of the property is not required", citing *In re Driscoll,* 127 F. Supp. 81, as authority therefor. This is an absolute misstatement of both the law and of the *Driscoll* case. In the *Driscoll* case, the District Court upheld a chattel mortgage which omitted the street address but which provided a detailed list of the items covered by the mortgage. In that case, Judge Mathes held that where the personal property had been described in sufficient detail so as to enable it to be found and identified on inquiry, the failure to give the address where the property was located did not destroy the validity of the mortgage.

The case of *Witt v. Milton,* 147 Cal. App. 2d 554 cannot be cavalierly "brushed off", as appellees have attempted to do in Point VI of their answering brief. *Witt v. Milton* present a scholarly examination and review of California law on the basic questions presented in the instant appeal. Appellant fails to see the relevance in appellees' reference in the same argument to the Civil Code section governing the method of describing livestock or other animate chattels.

In their Point VII, appellees seek to support the use in evidence of the inventory lists (which were premediatatedly and specifically withheld from the mortgage) upon

the Referee's position that the instrument contained the name and business address of the mortgagor and that an inquiry of such address would have led to the inventory list. This is, indeed, what the Referee held; and this is, indeed, one of the basic errors that the Referee made. Appellant feels that this phase of argument is covered at some length in Argument II of Appellant's Opening Brief. To sustain the trial court on this ground would change and amend the existing law in the State of California with respect to description of property covered by a chattel mortgage to the extent of holding that it is no longer necessary in the State of California to give *any* description of the personal property being made subject to the chattel mortgage, provided that the name and address of the mortgagor appear in the mortgage instrument—upon the theory that such name and address suggest a line of inquiry which puts an interested person upon notice, that he may, nay, *must* go to that address, knock on the door and inquire as to what the parties intended to be covered by the recorded mortgage—and, following through to the logical conclusion, that such interested party may then completely rely upon the information with which he is then provided, assuming that he is provided with any information at all. It is respectfully submitted that without legislating in the manner just stated, a court cannot uphold the subject chattel mortgage upon the Referee's second ground.

There then remains the question of whether the description appearing on the face of the subject mortgage provides an adequate description. The Referee held in his first ground that it did. This is discussed in Appellant's Opening Brief at page 19, *et seq.,* and in Point VIII of appellees' Answering Brief, commencing at page 18 of said brief.

Much is said about the proper use and definition of the word "certain". The case of *In re Mineral Lac Paint Co.,* 17 F. Supp. 1, is discussed at some length in appellant's opening brief for the reason that it is almost "on all fours" with the instant case, and for its thorough and authoritative analysis of the use and meanings of the word "certain" in such a context. Appellees attempt to distinguish the *Mineral Lac* case (Answering Brief, p. 20) on the ground that the *Mineral Lac* case involved an instrument which referred to a schedule of machinery and equipment attached, which, in fact, was not attached; while in the instant case, no reference at all was made to any exhibit or schedule of machinery and equipment. Appellees are in the absurd position of championing the proposition that a failure to make any reference whatsoever to an inventory list or schedule of equipment is more strongly suggestive of a line of inquiry, pursuit of which would lead to such inventory list, than is an express reference in an instrument to a schedule of machinery and equipment "referred to as Exhibit 'A' ".

In their efforts to run down a helpful definition of the word "certain", appellees in their Answering Brief (p. 23) again quote from the 1933 Third Edition of Black's Law Dictionary. In both the written and oral argument on the review before the District Court and in Appellant's Opening Brief (p. 20), appellant has cited the 1951 Fourth Edition of Black's Law Dictionary. This edition includes, among its definitions of the word "certain", a citation of the *Mineral Lac* case as authority for the definition "some among possible others". Appellees' loyalty to Black's Third Edition, while understandable, is hardly straightforward presentation.

Appellees seek support in the first definition of the word "certain" appearing in Webster's New International

Dictionary, Second Edition Unabridged, 1948 (Answering Brief, pp. 20, 21), and on page 21 set forth the language of the chattel mortgage as it might appear if the definition selected by appellees is substituted for the word "certain" as used in the subject mortgage. An examination of appellees' own example of their strongest position illustrates clearly the inadequacy of such language to adequately describe what items of personal property are to be covered by the chattel mortgage.

In holding that the description on the face of the subject mortgage was by itself adequate, the Referee had to stretch and stretch until, like the frog of the old fable, he burst: "Certain" is really equivalent to "the", and "the" is really the same as "all" and "all" is an "adequate description". (See Argument in Appellant's Opening Brief, p. 19, *et seq.*)

The Referee conceded that if the language in the subject mortgage had said "some" or "part" of the machinery, equipment, etc., his ruling would have to be different [Tr. 60], so in this sense even the Referee in not claiming that an address alone obviates the necessity of an adequate description of the personal property to be covered by the mortgage. Furthermore, the Referee also stated [Tr. 60] that if an innocent purchaser for value had purchased some of the fixtures, machinery and equipment for an adequate consideration, subsequent to the subject mortgage, there would be a substantially different situation—with the implication that in such a situation, also, he would have held differently. The Referee made it quite clear that he was ruling in the manner in which he did because of the "equities" of the situation.

This case is one which must be determined upon the basis of the Law. There is absolutely no authority nor any legal justification for stating that a chattel mortgage

which is legally inadequate and invalid under the Civil Code as against a bona fide purchaser for value is valid, binding and enforceable in favor of the mortgagee as against the mortgagor's trustee in bankruptcy. In this situation there is no separate rule; there is no such double standard.

Upon all of the grounds herein presented, the order of the Referee and the Order of the District Court Affirming the Order of the Referee should be reversed, with instructions to the Court below to enter judgment for appellant trustee in bankruptcy, declaring the subject chattel mortgage to be invalid and that appellees have no lien upon any of the assets of the subject bankrupt estate.

Respectfully submitted,

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